Recent Developments in Public Sector Labor Law

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THE COMPASSIONATE CARE ACT – EMPLOYMENT ISSUES RELATED TO MEDICAL MARIJUANA IN NEW YORK

Roemer Wallens Gold & Mineaux LLP

Prepared for CAASNY 2017 Conference - May 23, 2017[1]

I. BACKGROUND

Governor Cuomo signed the Compassionate Care Act ("CCA" or the "Act") on July 5, 2014, amending the public health law, the tax law, the state finance law, the general business law, the penal law and the criminal procedure law regarding the manufacture, distribution, and use of medical marijuana. In order to be qualified to use medical marijuana, a patient must be certified by a practitioner, such as a physician, trained by and registered with the Department of Health, licensed by the State and qualified to treat the "serious condition" for which the patient is seeking treatment. N.Y. Public Health Law § 3360.

A "serious condition" under the Act includes "cancer, positive status for human immunodeficiency virus or acquired immune deficiency syndrome, amyotrophic lateral sclerosis, Parkinson's disease, multiple sclerosis, damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity, epilepsy, inflammatory bowel disease, neuropathies, Huntington's disease," or other conditions added by the Commissioner of the Department of Health by regulation; and "any of the following conditions where it is clinically associated with, or a complication of, any of the aforementioned conditions or its treatment: cachexia or wasting syndrome; severe or chronic pain; severe nausea; seizures; severe or persistent muscle spasms," or such conditions as added by the Commissioner of the Department of Health by regulation. Id.

II. IMPACT ON EMPLOYMENT LAW AND PUBLIC EMPLOYERS

The provisions of the Act that are most likely to play a part in employment law or have an effect on public employers are:

- **"Public Place" Restrictions:** Medical marijuana shall not be smoked, consumed, vaporized, or grown in a public place. N.Y. Public Health Law § 3362. "Public place" shall include, among other locations, places of employment, enclosed indoor areas open to the public containing a swimming pool, public means of mass transportation (including buses, vans, and taxicabs when occupied by passengers), ticketing boarding and waiting areas in public transportation terminals, youth centers and facilities for detention, all public and private colleges, universities and other educational and vocational institutions, including dormitories, residence halls, and other group residential facilities owned by those institutions. 10 N.Y.C.R.R. § 1004.18. (NOTE: This list is non-exhaustive. Please see 10 N.Y.C.R.R. §1004.18(a) for a full list.

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[1] Please be advised that this material is provided as reference material only and does not constitute legal advice.

- **Health Insurers:** Insurers and insurance providers are not required to provide coverage of medical marijuana expenses. N.Y. Public Health Law § 3367.
- **Non-Discrimination:** The CCA provides that "patients, designated caregivers, practitioners, registered organizations and the employees of registered organizations shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right of privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, solely for the certified medical use or manufacture of marijuana, or for any other action or conduct in accordance with this title." N.Y. Public Health Law § 3369(1).
- **Disability Classification:** A certified patient is automatically deemed to be having a disability under, among other statutes, The New York State Human Rights Law (Article 15 of the Executive Law) – which includes prohibition of discrimination on the basis of disability in employment, and training opportunities; and which requires employers to provide a reasonable accommodation to employees or applicants with a disability (N.Y. Executive Law § 296.[2] These laws with respect to employment and reasonable accommodation in employment are applicable to interns as well as employees. N.Y. Executive Law § 296-c.

III. APPLICATION OF THE CCA BY NEW YORK EMPLOYERS

The plain language of the CCA states that employers shall not fire or otherwise discipline an employee simply for legally using marijuana prescribed by a doctor under the Act. N.Y. Public Health Law § 3369. However the Act provides that this provision shall not bar the enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance. N.Y. Public Health Law § 3369. The provision shall not require any person or entity to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding. Id. This is noteworthy, as marijuana remains a schedule I substance under federal law. (21 U.S.C. §812). The Americans with Disabilities Act ("ADA") provides that the protections of the ADA do not apply to persons who are currently engaged in the illegal use of drugs. 42 USC § 12101 *et seq.* Section 12114(a) It is also noteworthy for employers who employ federally-licensed CDL drivers.

IV. INTERACTION WITH THE AMERICANS WITH DISABILITIES ACT

States continue to pass medical marijuana legislation that provide more and more protections for affected parties; however, none of the state legislation has changed the fact that marijuana use is still illegal drug use under the Controlled Substances Act, and is, therefore, not protected under federal legislation such as the Americans with Disabilities Act (the "ADA). In James v. City of Costa Mesa, the 9th Circuit held that "Congress has made clear [], that the ADA defines 'illegal

[2] The CCA also deems covered individuals to have a "disability" as that term is defined in New York Civil Rights Law § 40-c, Penal Law §§ 240.00, 485.00 and 485.05, and Criminal Procedure Law § 200.50. N.Y. Public Health Law § 3369.

drug use' by reference to the federal, rather than state, law, and federal law does not authorize the plaintiff's medical marijuana use." 700 F.3d 394, 397 (9th Cir. 2012). Nevertheless, the New York Compassionate Care Act explicitly deems a certified patient to be "disabled" under the state disability discrimination statutes prohibiting employment discrimination and requiring the provision of reasonable accommodations.

V. OTHER STATES' CASE LAW ON MEDICAL MARIJUANA IN THE EMPLOYMEN CONTEXT

While there is no employment case law yet under the CCA, an examination of decisions in other states is helpful, particularly to the extent they examine the interplay with these laws and federal law. However, when examining the case law in other states it is important to note that these other state laws vary in their terms and protections for employees and restrictions upon employers, which are specifically provided for in the state law. Most notably, many states do not contain the specific duty to provide accommodation for medical marijuana users that the CCA includes. The state law position on this issue is noted in the discussion of the cases below.

Oregon: The Oregon Medical Marijuana Act does not require an employer to reasonably accommodate the medical use of marijuana "in the workplace." O.R.S. § 475B.413. In Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, The Oregon Supreme Court held employers do not have a duty to accommodate employee use of medical marijuana even off-duty because federal law, which explicitly prohibits marijuana use, preempts the sections of Oregon's Medical Marijuana Act that authorize the use of medical marijuana. 230 P.3d 518 (2010). The employee in that case claimed his employer unlawfully failed to accommodate his disability when he was terminated after he told his employer that he used marijuana for medical reasons. Id. No drug test was conducted, although the employer did have a drug testing policy in place. The Court found that because the plaintiff was engaged in the illegal use of drugs according to federal law and the employer discharged him for that reason, the protections of Oregon's discrimination statute did not apply.

Washington: The Washington "Medical Use of Marijuana Act" states "[n]othing in this chapter requires any accommodation of any on-site medical use of marijuana in any place of employment..." RCW 69.51A.060(4). However, the Act also expressly states that "[e]mployers may establish drug-free work policies" and "[n]othing in this chapter requires an accommodation for the medical use of marijuana if an employer has a drug-free workplace." R.C.W. 69.51A.060 (7).

In Swaw v. Safeway, Inc., the U.S. District Court for the Western District of Washington found an employer with a drug-free workplace policy could lawfully terminated an employee who tested positive for marijuana under the policy. Case No. C15–939 MJP, 2015 WL 7431106 (W.D. Washington, 2015.) The Court noted that "Washington law does not require employers to accommodate the use of medical marijuana where they have a drug-free workplace, even if medical marijuana is being used off-site to treat an employee's disabilities, and the use

of marijuana for medical purposes remains unlawful under federal law." Id. *See also*, Roe v. Teletech Customer Care Management, LLC, the Supreme Court of Washington 257 P.3d 586 (Wash. 2011)(the Medical Use of Marijuana Act does not require an employer to accommodate an employee's off-site use of medical marijuana.)

Michigan: A case decided by the Court of Appeals of Michigan heard three appeals together regarding whether an employee terminated for testing positive for marijuana, but possessing a valid registration identification, should be disqualified from receiving unemployment benefits. Braska v. Challenge Mfg. Co., 861 N.W.2d 289 (M.I. 2014). Each of the employees was subjected to a random, nondiscriminatory drug test pursuant to an employer's drug-free workplace policy and tested positive for marijuana. Id. None of the employees were accused of using marijuana on-duty, but were instead terminated based on the failed drug test under the employer's policy. Id. The Court examined the language of the Michigan Medical Marijuana Act ("MMMA"), which provides that qualifying patients "shall not" (1) "be subject to arrest, prosecution, or penalty in any manner," or (2) be denied any "right" or "privilege," "*including but not limited to* civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau...." Id. *citing* MCL 333.26424(a). The Court therefore found that denying the employees of their privilege to unemployment benefits is a prohibited penalty under the statute. Id. The Court held that although testing positive for marijuana would ordinarily be considered misconduct worthy of disqualification from unemployment benefits, because there was no evidence that the claimants were impaired at work or had ingested controlled substances while at work, and the claimants' use of medical marijuana was completely within the terms of the MMMA, denying them unemployment benefits was an improper penalty. Id.

Colorado: In a Colorado case, an employee alleged that he was terminated in violation of the state's employment discrimination provisions C.R.S. §§ 24–34–402(1)(a). Curry v. MillerCoors, Inc., No. 12-CV- 02471-JLK, 2013 WL 4494307 (D. Colo. Aug. 21, 2013). The employee had a valid license for the use of medical marijuana under state law and did not use marijuana on-duty. Nevertheless, Curry was terminated after testing positive for marijuana, which was a direct violation of MillerCoors' written drug policy. Id. at *1. Despite concern for Curry's condition, the Court ruled that the anti-discrimination law does not extend protection for a disabled employee from the employer's standard policies against employee misconduct. Id. at *3. The Court furthered, "a termination for misconduct is not converted into a termination because of a disability just because the instigating misconduct somehow relates to a disability. Therefore, though the employee may have never used medical marijuana absent his disability, MillerCoors did not unlawfully terminate him 'because of' his disability." Id. at *3. *See also*, Coates v. Dish Network, LLC., 350 P.3d 849 (Colorado Supreme Court 2015) (finding that an employee's off-duty medical marijuana use was not a "lawful activity" protected by Colorado's "lawful activities statute" [Colo. Rev. Stat. § 24-34-402.5] as the term "lawful" refers to activities that are lawful under both state and federal law, and, therefore, an employee's termination on that basis was not violative of that statute.)

SOCIAL MEDIA AND EMPLOYEE SPEECH IN THE PUBLIC SECTOR

Roemer Wallens Gold & Mineaux LLP

Prepared for CAASNY 2017 Conference - May 23, 2017[1]

I. OVERVIEW

The advent of e-messaging has created new means for employees to communicate, both on personal equipment during working hours, and using employer-owned equipment both on and off-duty. Such use raises novel issues and problems for employers. E-messaging, or electronic messaging, includes communication through blogging, text messaging, instant messaging and the use of social networking services such as Facebook, Twitter, LinkedIn, and MySpace. These technologies and services have become an essential communication tool in the modern workplace, and in fact are utilized by employers themselves to inform, advertise, and communicate with clients, constituents, and the general public. It is crucial for employers to be familiar with the application of the First Amendment to public employees' "speech" before taking action against an employee for statements made via social media, as well as the ways in which social media may lawfully be used as a tool for employee discipline and management.

II. FIRST AMENDMENT ISSUES – WHAT SPEECH IS PROTECTED?

The question of when an employee may be subject to discipline for posting material on websites involves consideration of whether the content is protected speech under the First Amendment and the impact of the employee's actions upon the workplace.

As a general rule, a public employer may not take adverse action against a public employee on a basis that infringes his/her Constitutional rights. As with an employee's right to be free from unreasonable searches, the First Amendment of the United States Constitution protects public employees' speech. However, whether the speech occurs on- or off-duty will affect the analysis.

In the landmark decision of Garcetti v. Ceballos, 547 U.S. 410 (2006), the U.S. Supreme Court held that where a public employee is speaking as an employee, he may be disciplined for the content of his speech. This case involved a deputy district attorney who issued a memorandum criticizing the issuance of a warrant in a criminal case. The deputy district attorney notified the attorneys prosecuting the case that the affidavit was questionable, but the district attorney's office refused to dismiss the case. The deputy district attorney then told the defense he believed the affidavit to contain false statements. As a result, the defense counsel subpoenaed him to

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testify. The deputy district attorney claimed that the employer retaliated against him by assigning him to less desirable work as a result of his writing the memorandum.

In reviewing this case, the Supreme Court established a two-step framework for examining employee speech. First, it must be determined "whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." Id. at 418. If the employee spoke as a citizen on a matter of public concern, then the analysis must proceed to the second step. Id. The second step requires a determination as to "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." Id. Essentially, this requires an examination of whether the speech affects the employer's operations. Id.

In Garcetti, the Supreme Court found that because the deputy district attorney was not speaking as a citizen on a matter of public concern, but rather as an employee of the government, he could be subject to discipline. Id. at 421. The Court concluded that when the employee wrote the memo, he was acting pursuant to his official job duties. Accordingly, the Court determined that this was "official-capacity speech." The apparent consequence of this holding is that the "official-capacity speech" category will further lessen the free speech protections of public employees and place a premium on public employers' use of comprehensive job descriptions, which enable them to take disciplinary action against unfavorable speech. *See also* Ricciuti v. Gyzenis, et al., 832 F. Supp. 2d 147, 156 (D. Conn. 2011), citing Weintraub v. Board of Education, 593 F.3d 196 (2d Cir. 2010), in relation to an employee's speech being made in furtherance of the employee's "core duties."

Public employees enjoy greater speech protections when they are off-duty. Nevertheless, this does not prohibit public employers from disciplining employees for speech made off-duty. In Curran v. Cousins, 509 F.3d 36 (1st Cir. 2007), an employee who had been suspended from work for disciplinary reasons posted messages on the discussion board of his union website making references to Hitler and the Nazis in discussing the decisions made by his superiors. The employee was subsequently terminated. Id. at 42-43.

The Court considered whether the employee's speech involved a matter of public concern and was therefore protected under the First Amendment. Although it found that a portion of the employee's postings had public interest value, it held that it did not follow that this rendered all of his speech protected. Id. at 46. Furthermore, the Court emphasized the fact that the speech posed a "substantial risk of disruption to the department." Id. at 49. It therefore found that the employee's First Amendment rights had not been violated by his termination.

Similar considerations were at issue in Dible v. City of Chandler, 515 F.3d 918 (9th Cir. 2008), although the case involved a very different subject matter. Dible concerned a police officer who operated a website containing sexually explicit material featuring him and his wife. Upon learning of this website, the Chandler Police Department suspended the officer and then terminated his employment after an investigation. Id. at 924. The officer argued that this action violated his right to freedom of speech under the First Amendment.

The Court first concluded that no matter of public concern was involved, and then considered the impact of his actions in relation to the effective and efficient operation of the police department. Id. at 928. The court noted that the officer's activities were "detrimental to the mission and functions of the employer" and that, when they became widely known to the public, officers were denigrated, and recruits questioned officers about the website. Id. The Court therefore held that the officer's First Amendment rights were not violated.

In Matter of Rubino v. City of New York, 34 Misc. 3d 1220(A), 2012 WL 373101, (Sup. Ct., N.Y. Co. 2012), the New York County Supreme Court overturned the decision of the New York City Department of Education to terminate a tenured teacher after the tenured teacher was found guilty of conduct unbecoming of a teacher for posting comments on her Facebook wall. The teacher's comments related to the recent drowning of a student during a field trip to the beach. She posted the following to her Facebook wall: "After today, I am thinking the beach sounds like a wonderful idea for my 5th graders! I HATE THEIR GUTS! They are the devils (sic) spawn!" Id. at **2. One of her Facebook friends then posted, "Oh you would let little Kwame float away!" to which the teacher responded, "Yes, I wld (sic) not throw a life jacket in for a million!!" Id. It was found that the teacher's Facebook postings did not constitute protected speech because the teacher posted the comments as a teacher and the comments did not pertain to a matter of public concern. Id. at **12. (Nevertheless, the Court overturned the hearing officer's determination to terminate the teacher because the teacher had an otherwise unblemished 15-year record, and remanded the case for imposition of a lesser penalty. Id. at **17, 21.)

III. SOCIAL MEDIA AS A TOOL FOR EMPLOYERS

Although e-messaging and social networking platforms often present challenges for employers, it can also aide employers in disciplining and regulating employees. Employees publicly post all sorts of personal information on social networking services such as Facebook, Twitter, and YouTube. This information can be used to glean valuable information about an employee's activity in certain circumstances. For instance, status updates on Facebook may reveal abuse of leave time, such as an employee who calls in sick, but posts publicly available information showing that he/she was instead attending a concert or sporting event.

Courts have held that information posted on social networking sites may be used against the employee. However, an employer should take precautions to ensure that it is using publicly-accessible information that is intended for public viewing. For instance, in Romano v. Steelcase, Inc., 30 Misc. 3d 426, (Sup. Ct. Suffolk Co., 2010), the Suffolk County Supreme Court addressed the issue of "whether there exists a right to privacy regarding what one posts on their online social networking pages such as Facebook and MySpace." There, the plaintiff commenced an action for personal injuries claiming that she maintained permanent injuries as a result of an incident that affected her enjoyment of life. Id. at 428. The defendant had reason to believe that the plaintiff was exaggerating her injuries and served the plaintiff with a discovery demand for "authorizations to obtain full access to and copies of Plaintiff's current and historical records/information on her Facebook and MySpace accounts." Id. The plaintiff refused to comply with the demand. Id. The court held that the information sought by the defendant regarding plaintiff's Facebook and MySpace accounts was material and necessary to the defense of the action and the plaintiff did not have any expectation of privacy in these accounts. Id. at 430. Because Facebook and MySpace enable people to share information about their social lives, the plaintiff had no reasonable expectation of privacy. Id. at 433-434. *See also*, U.S. v. Lifshitz, 369 F.3d 173 (2d Cir. N.Y. 2004) (holding that individuals do not have an expectation of privacy in internet postings or e-mails that have reached their recipients).

Accordingly, e-messaging and social networking services may be valuable tools for employers in monitoring and disciplining their employees when used appropriately and in accordance with existing jurisprudence.

Because this is an evolving area of law, employers should consult with their legal counsel on questions involving potential discipline relating to social media.

MUNICIPAL RIGHTS WHEN A PUBLIC SAFETY UNION DECLINES TO PATRICIPATE IN INTEREST ARBITRATION

Roemer Wallens Gold & Mineaux LLP

Prepared for CAASNY 2017 Conference – May 23, 2017

In a matter of first impression, the PERB Board ruled on November 15, 2016 that the City of Ithaca satisfied its duty to negotiate for a two year period upon the Police Benevolent Association declining to participate in Interest Arbitration and standing pat on the contract. In Ithaca Police Benevolent Assoc., Inc. (City of Ithaca), 49 PERB ¶ 3030 (2016), the parties proceeded through impasse resolution procedures without reaching an agreement. The City then filed a Petition for Interest Arbitration to cover the two year statutory period (in this case the years 2012 and 2013). The PBA declined to participate in the Interest Arbitration.

Following the declination, the City of Ithaca requested that the PBA begin negotiating for a new Collective Bargaining Agreement ("CBA") starting in 2014. The PBA declined and requested that the parties' bargain beginning 2012. In accordance with the Board's decision in City of Yonkers, 46 PERB ¶3027 (2013), the City of Ithaca filed an Improper Practice Charge alleging, *inter alia*, that the PBA waived its right to negotiate a new contract for the years 2012 and 2013 by standing pat on the contract through their declination.

The City thereafter filed exceptions to an Administrative Law Judge dismissal of the charge. The Board, however, reversed the ALJ and held that although the PBA had not "waived" its right to negotiate for an agreement covering 2012 and 2013, the City satisfied its duty to negotiate in good faith for that time period.

Following the Board's Decision, the PBA actually filed its own Petition for Interest Arbitration for the years 2012 and 2013. On December 23, 2016, PERB's Director of Conciliation denied the Petition stating that the City cannot be compelled to participate in interest arbitration for a period in which it already satisfied its duty to negotiate in good faith. A copy of the denial is attached herein. The PBA filed exceptions, which are currently pending before the Board.

In a similar proceeding between the Village of Saranac Lake and Saranac Lake Police Benevolent Assn., PERB's Director of Conciliation declined to designate the interest arbitration panel. A copy of the February 21, 2017 letter from the Director of Conciliation is also attached herein. Accordingly, the matter remains pending.

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December 23, 2016

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Case No: IA2014-002; M2013-105 – City of Ithaca and Ithaca Police Benevolent Assn., Inc.

Dear Messrs. Ryan & Crotty:

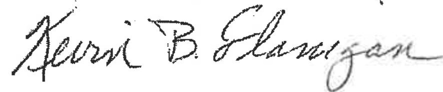
On May 12, 2014, the City of Ithaca (City) petitioned for interest arbitration. The Ithaca Police Benevolent Association, Inc. (PBA) responded on May 13, 2014 by asserting its right to stand on status quo and declined to participate in Interest Arbitration. The City subsequently filed an improper practice charge alleging the PBA was guilty of bad faith bargaining and contended the PBA had waived its rights to negotiate any modifications for the two-year period for which an arbitration panel could impose terms (January 1, 2012 through December 31, 2013). The ALJ dismissed the charge and the City then appealed to the Public Employment Relations Board (The Board). In its decision dated November 16, 2016 (*City of Ithaca,* PERB Case: U-34078), the Board rejected the City's waiver argument but held that the City had satisfied its duty to negotiate for the presumptive two-year period and therefore had no further *obligation* to bargain for that period. On December 2, 2016, the PBA filed its Petition for interest arbitration, for the very same time period and demanded the Petition be processed. The City then filed its Response on December 19, 2016 reiterating its defense not to be required to participate in interest arbitration for the period in question, pursuant to the Board's decision. The City also filed a second improper practice charge against the PBA on December 20, 2016.

I have carefully reviewed and considered all submissions by the representatives of both parties as well as the Board decision in this matter. First and foremost, the Board has already

ruled in this case and held that the City has fulfilled its bargaining obligation for the very period of time for which the PBA seeks interest arbitration. It is a fundamental principal that the same parties are precluded from re-litigating the same matter. Thus, to effectuate the decision of the Board, it is unnecessary to further analyze the parties' arguments regarding merits. The central ruling by the Board is that the City cannot be compelled to participate in interest arbitration for the period in question. The petition filed by the City in 2014 was denied in order to uphold the rights of the PBA. Now the City asserts the corollary defense. Accordingly, I find the union is not eligible to pursue interest arbitration for changes in terms for the period of January 1, 2012 through December 31, 2013. The petition for interest arbitration filed by the PBA on December 2, 2016 is hereby denied.

Should either party not agree with the determination made herein, I would direct their attention to PERB's Rules of Procedure, Part 213 - *Exceptions to the Board*. The parties are encouraged to cease the already extensive litigation and return to the bargaining table. The Office of Conciliation remains willing to provide assistance in reaching agreement as appropriate.

Very truly yours,



Kevin B. Flanigan
Director of Conciliation

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Case No: IA2016-014; M2012-101 – Village of Saranac Lake and Saranac Lake Police Benevolent Assn.

Dear Messrs. Ryan & Crotty:

This letter is in response to the ongoing correspondence between the representatives of the Village of Saranac Lake (Village) and from the representatives of the Saranac Lake Police Benevolent Association (PBA). This office has declined to designate the interest arbitration based on the facts in this case which appear to be essentially the same as in the PERB Board Decision in *City of Ithaca v. Ithaca Police Benevolent Association* (NY. Pub.Emp.Rep - November 15, 2016; 49 PERB ¶ 3030) after which this office made the determination to decline the petition for interest arbitration filed by the Ithaca PBA.

In May of 2014, the Village filed a petition for Interest Arbitration. The PBA, in its reply letter of July of 2014, specifically asserted its right to stand on *status quo* pursuant to PERB case law, (see *City of Yonkers & Yonkers Fire Fighters, Local 628 of the International Association of Fire Fighters;* 46 PERB ¶3027 [2013] and *City of Kingston & Local 461 of the International Association of Fire Fighters;* 18 PERB ¶3036 [1985]). At that time I determined this office would not process the PBA's petition for Compulsory Interest Arbitration. There was no further activity in the case with this office until a new petition for interest arbitration was filed by the PBA on October 24, 2016 for proposed modifications for June 1, 2012 through May 31, 2014. By letter received November 14, 2016, the representative for the

Village specifically objected to the petition citing the same grounds it had argued in the then pending case in *Ithaca*. On November 15, 2016 while the petition for interest arbitration in Saranac Lake was being processed, the PERB Board issued its decision in *Ithaca*.

The following critical elements occurred during the negotiations in both this case involving Saranac and in Ithaca. Together, these elements result in the petition being declined by this office.

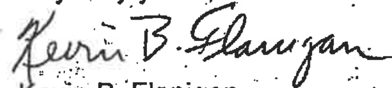
1. The union officially asserted its right to stand on status quo terms.
2. Greater than two years elapsed after expiration of the collective bargaining agreement and thus the filing of the petition by the union was beyond the presumptive maximum duration of a potential interest arbitration award.
3. The employer specifically asserted that it fulfilled its obligation to negotiate and has no continued obligation to participate in interest arbitration for the surpassed two year period.

The PBA insists this office lacks authority to decline processing the petition and contends the matter can only be decided by the Office of Public Employment Practices and Representation. As I stated in my determination with the same representatives in the case in Ithaca, this office has the duty to effectuate Board case law in how it processes petitions and responses for interest arbitration. This is a matter of upholding the rights of both parties in the first instance rather than a matter of arbitrability issues of scope or behavior of the parties during negotiations as delineated in PERB's Rules of Procedure (see Section 207.15).

In conclusion, I have not designated the panel in this case, however the PBA has requested the opportunity to fully brief the issues involved. I will not further process the petition in the meantime, however I would like to give both parties the opportunity to brief why they believe the present matter between the Village of Saranac and the Saranac PBA is or is not distinguishable from the case in Ithaca in which I also declined to accept the petition. I ask that briefs be returned within 60 calendar days and no later than Monday April 24, 2017.

Should you have further questions please feel free to contact me.

Very truly yours,



Kevin B. Flanigan
Director of Conciliation

Compilation of Codes, Rules and Regulations of the State of New York Currentness
Title 9. Executive Department
Subtitle J. Division of Human Rights
Part 466. General Regulations (Refs & Annos)

9 NYCRR 466.13

Section 466.13. Discrimination on the basis of gender identity

(a) Statutory Authority. Pursuant to N.Y. Executive Law section 295.5, it is a power and a duty of the Division to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of the N.Y. Executive Law, article 15 (Human Rights Law).

(b) Definitions.

(1) **Gender identity** means having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth.

(2) A **transgender person** is an individual who has a gender identity different from the sex assigned to that individual at birth.

(3) **Gender dysphoria** is a recognized medical condition related to an individual having a gender identity different from the sex assigned at birth.

(c) Discrimination on the basis of gender identity is sex discrimination.

(1) The term "sex" when used in the Human Rights Law includes gender identity and the status of being transgender.

(2) The prohibitions contained in the Human Rights Law against discrimination on the basis of sex, in all areas of jurisdiction where sex is a protected category, also prohibit discrimination on the basis of gender identity or the status of being transgender.

(3) Harassment on the basis of a person's gender identity or the status of being transgender is sexual harassment.

(d) Discrimination on the basis of gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out below is disability discrimination.

(1) The term "disability" as defined in Human Rights Law section 292.21, means:

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(i) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques; or

(ii) a record of such an impairment; or

(iii) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

(2) The term "disability" when used in the Human Rights Law includes gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out above.

(3) The prohibitions contained in the Human Rights Law against discrimination on the basis of disability, in all areas of jurisdiction where disability is a protected category, also prohibit discrimination on the basis of gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out above.

(4) Refusal to provide reasonable accommodation for persons with gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out above, where requested and necessary, and in accordance with the Divisions regulations on reasonable accommodation found at section 466.11 of this Part, is disability discrimination.

(5) Harassment on the basis of a person's gender dysphoria or other condition meeting the definition of disability in the Human Rights Law set out above is harassment on the basis of disability.

Credits

Sec. filed Jan. 5, 2016 eff. Jan. 20, 2016.

Current with amendments included in the New York State Register, XXXIX, Issue 9 dated March 1, 2017.

9 NYCRR 466.13, 9 NY ADC 466.13

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